Plumbers and Steamfitters Local 91 (Brock & Blevins) *and* Arthur L. Moorehead *and* George G. Henrey.
Cases 10–CB–7170 and 10–CB–7171

September 28, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On July 2, 1999, Administrative Law Judge Keltner W. Locke issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

A. Overview

The judge found that the Respondent violated Section 8(b)(1)(A) and (2) of the Act by improperly deviating from its hiring hall procedures, bypassing Charging Parties Arthur Moorehead and George Henrey on the Respondent's out-of-work list, and failing to refer them for certain job referrals. Applying recent precedent that issued after the judge issued his decision,[2] we reverse the judge's unfair labor practice findings and dismiss the complaint in its entirety.

B. Background

The pertinent facts common to both cases in this consolidated proceeding, as set forth more fully by the judge, are essentially as follows. The Respondent operates an exclusive hiring hall. It maintains separate out-of-work lists for plumbers, pipefitters, and welders. If a company with which the Respondent has a collective-bargaining agreement needs a worker in one of these classifications, it notifies the Respondent, which then makes a referral. Generally, under the Respondent's job referral procedures[3] the individual whose name has been on the out-of-work list the longest gets the first opportunity to fill a job referral.[4]

C. Arthur Moorehead

1. Facts

Moorehead signed the welders out-of-work list on January 2, 1998.[5] Harrison Whisenant, Berd Butler, and Mike Holt signed the list on January 8. On that afternoon, those three and Respondent's business agent, John Eaves, and assistant business agent, Donald May, were together in the hiring hall. At or about 4:45 p.m., after the close of dispatching hours,[6] Phillip Getschow, a contractor, called in a request for two welders, to report for work the following morning, to finish the work on a project. Eaves told the others that he had had "a lot of problems" with absenteeism on the Phillip Getschow project, and that he needed someone to go there the next morning to finish the job. Eaves first asked Whisenant to take the referral, and he declined. Eaves then asked Butler and Holt to take the referral, and they also declined. Eaves stressed that he needed someone to take the referral "right away," and asked the three welders if they would work on that project for just 1 day, in order to finish it. Whisenant and Holt then agreed to take the referral.[7]

Eaves testified that he did not have time that afternoon to make phone calls to those, including Moorehead, who were above Whisenant, Butler, and Holt on the out-of-work list, to fill this short-notice requirement. According to Eaves:

> I stressed to [Whisenant, Butler, and Holt] that I really needed them to go down there because I didn't know if I would have time to get travelers to go or get the call manned so I did talk them into going down there and doing that project.

Eaves testified that he could not remain at the hiring hall that night to try to find workers because he had a "very important" appointment at 5:30 that afternoon.[8]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] *Stage Employees Local 720 (AVW Audio Visual)*, 332 NLRB 1 (2000); *Plumbers Local 375 (H.C. Price Construction)*, 330 NLRB 383 (1999); and *Plumbers Local 342 (Contra Costa Electric)*, 329 NLRB 688 (1999) *(Contra Costa I)*, revd. and remanded sub nom. *Jacoby v. NLRB*, 233 F.3d 611 (D.C. Cir. 2000), on remand *Plumbers Local 342 (Contra Costa Electric),* 336 NLRB 542 (2001) *(Contra Costa II)*.

[3] These procedures are contained in the Respondent's collective-bargaining agreement with the Associated Plumbing, Heating and Cooling Contractors of Jefferson County, and the Mechanical Contractors Association of Birmingham, Alabama.

[4] More specifically, the job rotation system contained in the collective-bargaining agreement provides (with certain exceptions not pertinent here) that applicants will be referred from the hiring hall in response to employer requests for manpower "on a first in first out basis; that is, the first man registered shall be the first man referred."

[5] All dates are 1998, unless stated otherwise.

[6] The collective-bargaining agreement states that "[t]he hours of dispatching shall be from 8:00 A.M. to 10:00 A.M. and from 2:30 P.M. to 4:30 P.M., Monday through Friday, except holidays."

[7] As it turned out, it took 2 days to complete the work on the project.

[8] Eaves was not asked about the purpose of his 5:30 appointment, and the record does not otherwise reveal it.

The complaint alleges that the Respondent operated its hiring hall in a discriminatory, arbitrary, and capricious manner by failing and refusing properly to refer Moorehead, and by bypassing him for referral to the Phillip Getschow job.

2. The judge's findings

The judge found that the Respondent departed from its customary referral practices contained in the collective-bargaining agreement by referring Whisenant and Holt to the Phillip Getschow job ahead of Moorehead. The judge further found that the Respondent's failure properly to refer Moorehead was the result of "cutting corners," caused by Business Agent Eaves' need to leave the hiring hall promptly for an important meeting on the afternoon in question.

The judge further found that the record contains no evidence indicating that the Respondent discriminated against Moorehead because of protected concerted activities, or for other unlawful considerations, and that Eaves did not harbor animus toward Moorehead. The judge found instead that Eaves simply was in a hurry to get to his appointment and did not take time to make the telephone calls required under the agreed-upon referral procedure.

We agree with all of the judge's findings, additionally noting that the Respondent did not receive Phillip Getschow's request for workers until about 4:45 p.m., after the close of dispatching hours. As discussed below, however, we reverse the judge's ultimate conclusion that the Respondent nonetheless violated the Act when it bypassed Moorehead.

3. Analysis and conclusions

In *Plumbers Local 342 (Contra Costa Electric)*, 329 NLRB 688 (1999) (*Contra Costa* I),[9] which issued after the judge issued his decision here, the Board overruled decisions holding that a union's mere negligence in its failure to dispatch an applicant in the proper order from an exclusive hiring hall violates the duty of fair representation.[10] The Board also held that mere negligence in failing to follow hiring hall procedures does not violate Section 8(b)(1)(A) and (2) independent of the duty of fair representation, because simple mistakes do not carry the coercive message that hiring hall users had better support the union if they expect to be treated fairly in job referrals. Accordingly, the Board dismissed the allegation that the union had acted unlawfully by mere negligence in failing to refer an applicant for employment from its hiring hall.[11]

As fully discussed in *Contra Costa II*, however, the Board's decision in *Contra Costa I* was reversed by the District of Columbia Circuit Court of Appeals, and remanded to the Board. 233 F.3d 611 (2000). The court held that the Board's reading of *Steelworkers v. Rawson*, supra, and *Air Line Pilots Assn. v. O'Neill*, supra (which were not hiring hall cases), could not be reconciled with the court's earlier holding, in *Plumbers & Pipe Fitters Local 32 v. NLRB*, 50 F.3d 29, 33 (1995), that the Supreme Court in *O'Neill* did not intend to weaken the standard of review applicable to hiring hall operations. The court also found the Board's reading of *Rawson* and *O'Neill* to be at odds with the Supreme Court's statement in *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67, 89 (1989), that the imbalance of power and possibilities for abuse in the hiring hall setting were such that if a union wielded additional power in a hiring hall by assuming the employer's role, its responsibility to exercise that power fairly *increased* rather than *decreased*. Thus, the court remanded *Contra Costa I* to the Board to determine whether the union's negligent conduct was an unfair labor practice, in light of what the court found to be the "union's heightened duty of fair dealing in the context of the hiring hall." 233 F.3d at 617.

The Board accepted the court's remand, and, having done so, accepted the court's opinion as the law of the case. *Contra Costa II*, 336 NLRB, supra at 542. For the reasons fully discussed in its supplemental decision on remand in *Contra Costa II*, the Board, applying the court's "heightened duty" standard, reaffirmed its holding in *Contra Costa I* that inadvertent mistakes in the operation of an exclusive hiring hall arising from mere negligence do not violate a union's duty of fair representation and also do not violate Section 8(b)(1)(A) and (2). In this context, the Board specifically reaffirmed its holdings in *Operating*

[9] Revd. and remanded sub nom. *Jacoby v. NLRB*, 233 F.3d 611 (D.C. Cir. 2000), on remand *Plumbers Local 342 (Contra Costa Electric),* 336 NLRB 542 (2001) (*Contra Costa II*).

[10] The Board relied on *Steelworkers v. Rawson*, 495 U.S. 362 (1990), in which the Supreme Court held that mere negligence, even in the enforcement of a collective-bargaining agreement, does not breach a union's duty of fair representation. The Board also relied on *Air Line Pilots Assn. v. O'Neill*, 499 U.S. 65 (1991), in which the Court noted that the duty of fair representation applies to the operation of hiring halls, and held that the same test for determining whether the duty has been breached—i.e., whether the union's conduct was "arbitrary, discriminatory, or in bad faith"—applies to all union activity. The Board read those decisions together as foreclosing a finding that negligence in the operation of a hiring hall constitutes a breach of the duty. The Board further noted that in so holding, it was acting consistently with its decisions finding that mere negligence in other union conduct (e.g., grievance processing) does not breach the duty of fair representation, and also with its early decisions applying the duty of fair representation to the operation of hiring halls.

[11] The Board in *Contra Costa I* also cited *Boilermakers Local 374 (Combustion Engineering)*, 284 NLRB 1382, 1383 (1987), enfd. 852 F.2d 1353 (D.C. Cir. 1988), where the Board stated that a finding of arbitrariness in the operation of an exclusive hiring hall requires a showing of "something more than mere negligence or the exercise of poor judgment on the part of the union."

Engineers Local 18 (Ohio Pipe Line), 144 NLRB 1365 (1963); and *Plumbers Local 40*, 242 NLRB 1157, 1163 (1979), enfd. mem. 642 F.2d 456 (9th Cir. 1981), that inadvertent mistakes or errors in judgment, respectively, in operating a hiring hall do not violate the duty of fair representation. *Contra Costa II*, supra at 544. The Board further found that simple mistakes caused by mere negligence in referring individuals from hiring halls would not reasonably breach even the heightened duty of fair dealing by a union in the operation of a hiring hall envisioned by the D.C. Circuit in remanding *Contra Costa I*. Id. at 544. Accordingly, the Board also reaffirmed its *Contra Costa I* overruling of *Iron Workers Local 118 (California Erectors)*, 309 NLRB 808 (1992), and other decisions to the extent that they are inconsistent with the Board's reaffirmed holding in *Contra Costa II*.

Subsequent to *Contra Costa I*, the Board also issued its decision in *Stage Employees Local 720 (AVW Audio Visual)*, 332 NLRB 1 (2000) (*AVW*). There, the Board found that the union did not breach its duty of fair representation or violate Section 8(b)(1)(A) and (2) of the Act by permanently barring Steven Lucas from using the union's exclusive hiring hall. The union had earlier permanently expelled Lucas from the hiring hall for 15 years of misconduct towards fellow employees, employers, and hiring hall clients.[12] Lucas subsequently submitted a letter to the union from a clinical psychologist, which stated that there was no reason why Lucas should not be considered psychologically fit and able for employment. The union declined to readmit him to the hiring hall.

The Board noted in *AVW* that as part of a union's duty of fair representation in the operation of an exclusive hiring hall, the union must operate the hiring hall in a manner that is not arbitrary or unfair. It found that to establish "arbitrary" conduct, it would not be enough to show errors in judgment, or that a more prudent union would have acted differently. Id. at 1. Rather, "a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside 'a wide range of reasonableness' . . . as to be irrational." Id. at 2, quoting *Air Line Pilots Assn. v. O'Neill*, 499 U.S. 65, 67 (1991). The Board recognized that there is a presumption of unlawful conduct where a union operating an exclusive hiring hall prevents an employee from being hired, but stated that the presumption may be overcome where, inter alia, the facts show that the union's action was necessary to the effective performance of its function of representing its constituency. Id.

The Board found that the union did not act arbitrarily in concluding that Lucas had not provided the union with adequate grounds for reversing its prior decision to bar him from using its hiring hall. The Board further concluded that the union's refusal to refer Lucas was necessary to the effective performance of its function of representing its constituency, and that the union had used reasonable judgment in concluding that the effective operation of its hiring hall, with respect to both registrants and employers, required it to deny Lucas readmission to the hall. Id. at 4.

We find that the principles in *Contra Costa I and II* and *AVW* apply here. Although Eaves deviated from the hiring hall's "first in, first out" rule in referring Whisenant and Holt to the job and bypassing Moorehead, we find, in agreement with the judge, that Eaves' actions were the result of "cutting corners" so he could attend an important meeting, and were not motivated by discrimination or animus against Moorehead. As the judge stated, Eaves "simply was in a hurry to get to his appointment and did not take time to make the telephone call required under the agreed-upon referral procedure." Thus, the judge's own factual findings establish that Eaves was merely negligent in failing to follow the prescribed procedures, or at worst made a good-faith error in judgment. See *Plumbers Local 40*, supra, cited in *Contra Costa II*. Accordingly, consistent with *Contra Costa I and II*, we conclude, contrary to the judge, that Eaves' failure to refer Moorehead did not breach the Respondent's duty of fair representation or violate Section 8(b)(1)(A) and (2) of the Act.

Even assuming that Eaves' failure to refer Moorehead was not a simple mistake but a deliberate, volitional departure from the hiring hall rules, we would still find that dismissal of the complaint allegation is warranted under *AVW*. Clearly, Eaves was confronted with an urgent situation on the afternoon in question: a late call, from a contractor who was a current client of the exclusive hiring hall, received after the close of dispatching hours and less than an hour before a very important appointment for Eaves, requesting two employees to report the following morning for a short-term job finishing work on a project that had been experiencing absenteeism problems. Eaves could have waited until the following morning and begun calling registrants during the normal operating hours of the hall. This course of action, however, would have posed the risk of delaying the start of work on the Phillip Getschow job and thus not being responsive to the needs of the contractor. Eaves decided instead to promptly fill the request with two individuals who were on the out-of-work list and present in the hall. Faced with a difficult situation, Eaves' decision was not "so far outside a wide range of reasonableness as to be irrational." *AVW*, supra at 3. Further, to the extent that Eaves departed from the hiring hall rules, he did so only to the extent "necessary to the effec-

[12] There was no allegation that this expulsion was unlawful.

tive performance of [the Respondent's] function of representing its constituency" in efficiently operating the hiring hall. Id.[13]

Accordingly, for all of the above reasons, under *Contra Costa I and II* as well as *AVW*, we shall dismiss this allegation.

D. George Henrey

1. Facts

Henrey signed the pipefitters out-of-work list on December 30, 1997. On January 12, the Respondent bypassed Henrey's name on the list, and referred several pipefitters who had signed the list after he did to the Brock & Blevins job. Henrey was offered a referral to that job on January 15, and he accepted it.

Eaves testified that it was his understanding from conversations he had with Henrey that he did not want to be referred to the Brock & Blevins job, but instead wanted to wait to be referred to the anticipated M & D job. Eaves testified that Henrey said that he would take his chances on getting referred to the M & D project rather than the Brock & Blevins project, because the former was 30 miles closer to his home than the latter. Thus, based on what Eaves assertedly understood to be Henrey's "adamant" preference for the M & D project, Eaves bypassed him for the Brock & Blevins project.

Henrey, on the other hand, denied stating that he did not want to be referred to the Brock & Blevins job or that he was "adamant" about waiting for the M & D project. Henrey testified that he told Eaves only that "if there were two jobs available, I had a preference for one over the other."

2. The judge's findings.

The judge concluded that both Eaves and Henrey were testifying truthfully, and that the difference in their respective versions arose from a bona fide misunderstanding between them. Thus, the judge found that although Henrey had made remarks indicating that he did not consider the Brock & Blevins job to be as desirable as some other ones, Henrey did not specifically tell Eaves that he would decline a referral to the Brock & Blevins job. The judge further found, however, that Eaves "jumped to the conclusion that Henrey was not interested in working the Brock & Blevins job." When Eaves belatedly found out 2 days later that he had been wrong about Henrey's preferences, he immediately referred him to the Brock & Blevins job. The judge found that there was "not . . . even a hint of discriminatory motivation."

We agree with the judge's finding that there was a bona fide misunderstanding between Eaves and Henrey about whether Henrey wanted to be referred to the Brock & Blevins job, or whether he instead wanted to wait for the M & D job. We also agree with the judge's finding that there was no showing of discriminatory motive on Eaves' part in bypassing Henrey for the Brock & Blevins job. Rather, we agree with the judge that Eaves' bypassing Henrey was the direct result of a good-faith, albeit mistaken, belief by Eaves that Henrey wanted to wait for the M & D job rather than be referred to the Brock & Blevins project. As with Moorehead, however, we reverse the judge's ultimate conclusion that the Respondent nonetheless violated the Act when it bypassed Henrey.

3. Analysis and conclusions

As discussed above, the Board held in *Contra Costa I* and reaffirmed in *Contra Costa II*, supra, that mere negligence in the operation of an exclusive hiring hall does not constitute a breach of the duty of fair representation or a violation of Section 8(b)(1)(A) and (2) of the Act. Subsequent to *Contra Costa I*, the Board issued its decision in *Plumbers Local 375 (H.C. Price Construction)*, 330 NLRB 383 (1999) (*H.C. Price*). There, the Board applied *Contra Costa I* and found that the union did not breach its duty of fair representation or violate Section 8(b)(1)(A) and (2) of the Act by failing to refer an employee to jobs from its exclusive hiring hall for a 3-month period, even though he had signed the referral register. There was no showing of union malice toward the employee. The Board found that the union's failure to refer him was not even negligent, but instead resulted from the union dispatcher's good faith but mistaken belief that the employee did not want to work during the period in question.

Applying these principles here, we find that the Respondent has not breached its duty of fair representation or violated Section 8(b)(1)(A) and (2) of the Act by bypassing Henrey on January 12 and failing to refer him to the Brock & Blevins project until January 15. Clearly, Eaves had formed a good-faith, albeit mistaken, belief that Henrey wanted to wait for the M & D job rather than be referred to the Brock & Blevins project. In this regard, the instant case is very similar to *H.C. Price*, which also involved a dispatcher's good-faith but mistaken belief about the work preferences of a hiring hall registrant. Accordingly, consistent with *Contra Costa I* and *II* and *H.C. Price*, we find that the Respondent has not breached its duty of fair representation or violated Section 8(b)(1)(A) and (2) of the Act by bypassing Henrey and failing to refer him to the Brock & Blevins job on January 12.

ORDER

The complaint is dismissed.

[13] See also *Plumbers Local 460* (*McAuliffe Mechanical*), 280 NLRB 1230 (1986).

Gregory Powell, Esq., for General Counsel.
Glenn M. Conner, Esq. (Whatley Drake, L.L.C.), of Birmingham, Alabama, for Respondent.

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. In this case, the General Counsel of the National Labor Relations Board (the General Counsel) alleges that Plumbers and Steamfitters Local 91 (the Respondent or the Union) operated its exclusive hiring hall in a manner which violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act). I conducted the hearing in this case on March 1, 1999, in Birmingham, Alabama,[1] and find that the government has proved the violations alleged.

FINDINGS OF FACT

I. UNDISPUTED ALLEGATIONS

The Union has admitted the allegations raised in paragraph 1 of the complaint and its three subparagraphs. I find that the charges in this matter were filed and served in the manner alleged.

The Union also has admitted, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act. Further, the Union has admitted, and I find, that at all times material to this case, its business agent, John Eaves, and its assistant business agent and secretary, Donald May, were its agents within the meaning of Section 2(13) of the Act.

The record establishes that all times material to this case, the Union has operated a hiring hall, which has referred plumbers, pipefitters, and welders to work for various employers in Alabama. Although Respondent's written answer denied that this hiring hall was exclusive, Respondent orally amended its answer at the hearing to admit this allegation. In light of this admission, I find that the Union's hiring hall was an exclusive source of referral for certain construction industry employers seeking to hire plumbers, pipefitters, and welders.

Uncontradicted evidence further establishes that, in operating its hiring hall, the Union maintains separate out-of-work lists for plumbers, pipefitters, and welders. A person qualified to work as a plumber, pipefitter, or welder seeks referral by signing the appropriate out-of-work list.

If a company with which the Union has a collective-bargaining agreement needs a worker in one of these job classifications, it notifies the Union, which then makes a referral. In picking the applicant for referral, the Union is supposed to follow the procedures set forth in the collective-bargaining agreement, which contains these two appendices: "Regulations for Application for Hiring Procedure," and "Plan II—Simple Rotation System."

One of the companies which used the Union's hiring hall is a Wisconsin corporation known as Phillip Getschow. In accordance with the admissions in the Respondent's answer, I find that Phillip Getschow is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all times material to this case, Phillip Getschow performed work at a Wilsonville, Alabama jobsite called the Gaston Steam Plant. Another construction company using the Union's hiring hall, Brock & Blevins, performed work at a Parrish, Alabama jobsite called the Gorgas Steamplant.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Complaint paragraph 9 alleges the conduct which the government contends violated Section 8(b)(1)(A) and (2) of the Act. It states that since on or about January 8, 1998, "the Union has discriminatorily operated and/or acquiesced in the discriminatory operation of [its exclusive hiring hall] by failing and refusing to properly refer, and/or bypassing for referral for employment to employers Phillip Getschow and Brock & Blevins employees/hiring hall registrants Moorehead and Henrey."

A. How the Hiring Hall Works

The process of determining whether the Union bypassed a registrant must begin with an understanding of the proper procedure, defined by the collective-bargaining agreement between the Union and the Associated Plumbing, Heating and Cooling Contractors of Jefferson County, and Mechanical Contractors Association of Birmingham, Alabama. This agreement, found in evidence as Joint Exhibit 1, is titled "Working Agreement of the Plumbing and Pipefitting Industry." Article 4 of this agreement states, in part:

> 4. A Job Referral Plan has been established. The Job Referral Plan is a simple Rotation System, based on experience plus an examination. Selection of applicants for jobs will be on a non-discriminatory basis and will not be based on or in any way affected by union membership, by-laws, rules, regulations, constitutional provisions, race, creed, color, religion, national origin, or any other aspect or obligation of union membership policies or requirements.

The job referral plan, attached at the end of the collective-bargaining agreement, defines the qualifications which a plumber or pipefitter must have to be eligible to use the referral service. The Union has not asserted that the alleged discriminatees failed to meet such qualifications and such qualifications are not an issue in this case.

Section 4 of the job referral plan specifies as follows:

> Section 4. Referral of Men. Upon the request of a contractor for plumbers or pipefitters, the union shall immediately refer competent and qualified registrants to that contractor in sufficient number required by the contractor, in the manner and under the conditions specified in this agreement, from the separate appropriate out-of-work list on a first in first out basis; that is, the first man registered shall be the first man referred.

This section goes on to list certain exceptions to the "first in first out" rule. These exceptions apply to requests by contractors for key men to act as supervisors and foremen, requests by contractors for particular individuals who have been laid off within 150 days, and bona fide requests for plumbers or pipefitters with special skills or abilities. The present case does not involve any of these exceptions.

Whether or not the Union followed the "first in, first out" rule appears to be the key factual question in this case. Before addressing that issue, however, I will complete the description of the Union's hiring hall with a few more facts.

[1] Errors in the transcript have been noted and corrected.

Article 4 of the collective-bargaining agreement states that a joint hiring committee, composed of employer and employee representatives, had been established to put the referral plan into effect. It further provides that regulations established by this joint hiring committee would become part of the collective-bargaining agreement. The joint hiring committee did establish such "Regulations for Application for Hiring a Procedure," which were included with the collective-bargaining agreement. These regulations include the following, which are relevant to the issues in this case.

> 4. Any unemployed person who refuses two referrals shall have his name placed at the bottom of the unemployed list.
>
> 5. Any person who is on the unemployed list shall be removed from such list after five days of employment. Any person quitting a job when there is as much as five days or more work available shall be placed at the bottom of the list.
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> . . . .
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> 11. Each applicant shall leave his phone number or numbers where he may be reached, if he isn't in the dispatcher's office when the call [from an employer] comes in. If someone answers the phone number he has left and is in the process of contacting the registrant, the dispatcher shall wait one hour before trying to contact the next man on the list. Any applicant at the top of the list not contacted shall remain at the top of the list and shall be notified of the unsuccessful call with a collect telegram from the dispatcher.
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> . . . .
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> 15. The dispatcher shall keep a list of all phone calls or other means, for referral of men at the dispatch office. Such list must be kept for at least one year.

B. Allegations Involving Moorehead

Charging Party Arthur Moorehead, a welder, has used the Union's hiring hall since 1966. He testified that he visited the union hall on January 2, 1998, and signed the out-of-work list for welders. This out-of-work list, Joint Exhibit 2, corroborates this testimony, which I credit.

On January 8, 1998, the contractor Phillip Getschow called the Union, requesting that two welders be referred. It is undisputed that union officials did not call Moorehead, but instead referred Harrison Whisenant, who had signed the out-of-work list on January 8, 1998, the same day he was referred. (The out-of-work list, Jt. Exh. 2, shows his signature as "H. W. Whisenant.")

Whisenant's testimony provides insight into the events leading up to this apparent departure from the "first in first out" rule. He appeared to be a disinterested witness who would not stand to gain or lose regardless of the outcome of this case. I credit his testimony.

Considered with Joint Exhibit 2, that testimony establishes that Whisenant was laid off from a job for a contractor known as "Bisco" on January 8, 1998, and, that same afternoon, went to the union hall, arriving sometime around 4:15 or 4:20. After signing the out-of-work list, Whisenant lingered at the union hall, talking with four men, two of them being Business Agent John Eaves and Assistant Business Agent Donald May.

About 4:45 p.m., the telephone rang and the assistant business agent answered it. According to Whisenant, May "interrupted our conversation and said [to the business agent] John, this is Phillip Getschow on the phone and they need two guys down there in the morning to finish that job up and they've got to have them."

In Whisenant's words, Business Agent Eaves then "said that he needed somebody to go down there to finish that job up that he had had a lot of problems down there with absenteeism and things and asked if I would go."

Whisenant declined and Eaves then asked the two other visitors, Mike Holt and Berd Butler, if they would accept the job. Both declined. Then, the business agent stressed that he needed to refer someone to that job "right away" and asked if they would work there for just 1 day, to finish it. Whisenant and Holt agreed to do so. However, it turned out that the job actually took 2 days, rather than 1.

The government asserts that the referral of Whisenant, rather than Moorehead, violates Section 8(b)(1)(A) and (2) because Moorehead signed the out-of-work list 6 days before Whisenant, and yet Whisenant received the referral, contrary to the "first in, first out" rule governing operation of the hiring hall. The Union counters that it did not violate this rule because it already had given Moorehead a referral before it sent Whisenant out. Specifically, Assistant Business Agent May testified that he had a conversation with Moorehead on January 7, 1998, and gave him a referral to begin work at the Brock and Blevins job on January 12. According to May, he gave Moorehead a piece of paper containing the date the job was to begin, the contract, and the time he was to report for work.

Moorehead squarely denied that May had given him a referral to the Brock and Blevins job. Both Moorehead and May appeared to be reliable witnesses and it is not possible to resolve this conflict on the basis of the demeanor of the witnesses. I credit Moorehead's testimony because it appears more consistent with other evidence which indicates that Business Agent Eaves did not call Moorehead simply because Eaves was in a hurry.

On January 8, 1998, the contractor had called the Union for workers some time around 4:45 p.m. On that particular evening, Eaves had a 5:30 appointment he considered very important. In the business agent's own words, "I had an appointment at 5:30 that I had to make." He therefore had little time to stay at the union hall telephoning applicants on the out-of-work list.

It appears clear that Eaves was in a hurry, because he did not record the Getschow call in the union log book, which is the usual practice. Additionally, when Moorehead later asked Eaves to explain why the business agent had not tried to call him on January 8, Eaves referred to the appointment that evening. Specifically, Moorehead credibly testified that Eaves "said that he had got the call late that evening and that Mr. Whisenant and Mr. Holt had just walked in the hall and signed the list and he sent them on down to the job because he had something that he had to do that evening."

Although I have decided to credit Moorehead rather than May, it may be noted that there is a middle ground between May's testimony that he already had given Moorehead a referral slip, and Moorehead's testimony that he had not received one. It is possible that a union official had contacted Moorehead about the

Brock and Blevins job, and then noted in the log book that Moorehead would accept this referral.

Thus, Business Agent Eaves testified that "At that particular time," meaning the afternoon of January 8, 1998, after Phillip Getschow called, "I determined that everybody that was on that [out-of-work] list except for those three men sitting there had already obligated or committed to go to another job." Looking at the log book, he found that applicant Moorehead "had already committed and was referred to that job at Brock and Blevins."

This testimony is certainly consistent with the timing of events. Brock and Blevins called the Union on January 6, 1998, with its request for workers. Thus, Eaves or May could have contacted Moorehead on January 7, 1998, ascertained that Moorehead would accept the referral to Brock and Blevins, and noted it in the log book.

Although I have credited Moorehead's testimony, denying that he received such a referral, even assuming that union officials did contact Moorehead on January 7 about working the Brock and Blevins job, that commitment would not have removed Moorehead from consideration when Getschow called on January 8. Rule 5 of the "Regulations for Application for Hiring Procedure" defines when the Union shall remove an applicant's name from the out-of-work list. That removal does not take place when an applicant receives a referral or even when he begins work. Rather, it takes place after 5 days of employment. Even if the business agent anticipated that Moorehead's name would soon be removed from the out-of-work list, because of his expected referral to the Brock and Blevins job, the agreed-upon hiring hall rules did not make such anticipation a justification for skipping over his name.

The evidence clearly establishes that the Union departed from the customary referral practices embodied in the two attachments to the collective-bargaining agreement. Based upon all of the evidence, I find that the failure to refer Moorehead was the result of "cutting corners," caused by the business agent's need to leave promptly that afternoon for an important meeting.

On the other hand, the record contains no evidence indicating that the Union intentionally discriminated against either Moorehead or Henrey because of protected, concerted activities or other unlawful considerations. There is no evidence of ill feelings between the union officials and the alleged discriminatees, both of whom had been union members for many years.

If finding a violation turned on a showing of improper motivation, I would recommend dismissal of the charges. However, the law does not require such a showing in this case, which involves the Union's operation of an exclusive hiring hall.

A union does not have to operate an exclusive hiring hall, but if it decides to do so, it exercises power which, in other situations, belongs to the employer. In effect, the union decides who will be hired and who will not. Since a union operating an exclusive hiring hall has greater-than-ordinary power, the law imposes on the union a greater-than-ordinary duty of punctilio. As the Supreme Court has recognized, "if a union does wield additional power in a hiring hall by assuming the employer's role, its responsibility to exercise that power fairly increases rather than decreases." *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67, 89 (1989).

Section 8(b)(2) of the Act makes it unlawful for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)" of the Act. 29 U.S.C. § 158(b)(2). When a union operates an exclusive hiring hall, it has the potential to cause employer discrimination directly, by its choice of job applicants for referral, rather than indirectly, by putting pressure on an employer to hire or reject a particular applicant. Moreover, the exclusive nature of the hiring hall means that the way it operates will affect all job applicants.

The labor law, therefore, has evolved distinct principles to be applied to exclusive hiring halls. The Board has held that a union operating such a referral system may violate Section 8(b)(1)(A) and (2) by deviating from its hiring hall procedures even in the absence of a specific discriminatory intent. *Sheet Metal Workers Local 19*, 321 NLRB 1147 (1996); and *Electrical Workers Local 211 (Atlantic Division NECA)*, 280 NLRB 85, 86–87 (1986).

In this case, the union official did not harbor animus towards Moorehead. He simply was in a hurry to get to his appointment, and did not take time to make the telephone call required under the agreed-upon referral procedure. Under the law, that makes no difference. I find that bypassing Moorehead violated Section 8(b)(1)(A) and (2) of the Act.

C. Allegations Involving Henrey

George Gregory Henrey, a pipefitter known as "Greg" Henrey, has used the Union's hiring hall for 21 years. On December 30, 1997, he signed the pipefitters' out-of-work list (Jt. Exh. 3).

Henrey credibly testified that on January 12, 1998, the Union referred to the Brock and Blevins job nine pipefitters who had signed the out-of-work list after he did. The Union's log book (Jt. Exh. 4) confirms that the individuals referred to the Brock and Blevins job on January 12 did not include Henrey.

On January 15, 1998, Business Agent Eaves called Henrey and offered him a referral to the Brock and Blevins job. Henrey accepted the referral.

Union Business Agent Eaves does not deny bypassing Henrey's name on the out-of-work list when he selected applicants for referral on January 12, 1998. However, Eaves asserted that he did so because Henrey had told him that he was not interested in working at the Brock and Blevins jobsite.

Specifically, Eaves testified that on December 30, 1997, he spoke with Henrey, who had come into the hall to sign the out-of-work list. The business agent told Henry about a job in Wilsonville, Alabama (the M&D job). Eaves expected this work to last from 3 to 5 weeks, and believed it would require those referred to work 10 hours a day, 6 days a week.

According to Eaves, Henrey told him that he was not interested in any "seven twelves," presumably meaning some other projects which, unlike the M&D job, would require him to work 7 days a week, 12 hours a day. Eaves quoted Henrey as saying he would rather take his chances on getting referred to the Wilsonville project, because it was 30 miles closer to his home than the contemplated Brock and Blevins jobsite at Parrish, Alabama.

Eaves testified that he had another conversation with Henrey on January 5, 1998, when he telephoned Henrey to offer him a 1-day referral to another jobsite, which Henrey declined. This work opportunity did not involve either the expected job at Parrish, Alabama (the Gorgas Steamplant work to be performed by Brock

and Blevins) or the M&D job at Wilsonville, Alabama, but the two men began talking about these projects.

According to Eaves, when he described the Brock and Blevins project, Henrey "told me again that he wanted to take his chances to go to M&D" rather than to the Brock and Blevins job. Eaves described Henrey as being "adamant" about going to M&D. Because Henrey was holding out so adamantly for the M&D job, Eaves explained, he did not call Henrey to discuss Brock and Blevin's request for employees to work at the Gorgas Steamplant.

Contrary to Eaves's testimony, Henrey denied telling the business agent that he did not want to work the Gorgas Steamplant job, and denied that he was "adamant about going to M&D." In fact, Henrey denied making such statements rather adamantly:

> Q. Now, at any time did you tell Mr. Eaves that you did not want to work at Brock and Blevins?
>
> A. Absolutely not. The only statement I ever made is that if there were two jobs available I had preference for one over the other.

The next day after the January 5 telephone conversation between Henrey and Eaves, the Union received the awaited call from Brock and Blevins, asking for workers. Business Agent Eaves noted this call in his log, and began contacting applicants on the out-of-work list. However, he passed over Henrey's name on the out-of-work list. "I went on past," Eaves explained, "because I knew he was waiting on the M&D call."

Both Henrey and Eaves appeared to be credible witnesses. Other evidence does not resolve the conflict in their testimony. Based on my observations of their demeanor, I conclude that both Henrey and Eaves were telling the truth when they testified.

In this case, neither an intent to deceive nor fallible memory caused the discrepancy in the accounts of these two witnesses. Rather, I find that the difference arose from a bona fide misunderstanding between the two men.

During his conversations with Eaves, Henrey mentioned that he was helping his nephew start a new business. Also, during these conversations, Henrey made statements indicating that he did not consider the Brock and Blevins job as desirable as some other jobs, but did not specifically tell the business agent that he would turn down the opportunity to work there if offered. However, Business Agent Eaves, putting these facts together, jumped to the conclusion that Henrey was not interested in working the Brock and Blevins job. Therefore, when the time came to refer workers, Eaves passed over Henrey's name on the list, but did refer him 2 days later, after learning that Henrey would, in fact, accept the referral.

I presume, but need not decide, that under the established hiring hall procedure, Henrey could have declined the referral offer even before he received it. In other words, it appears reasonable to assume that the agreed-upon rules would have allowed Henrey to tell the business agent to skip over his name if job openings arose at the Brock and Blevins job.

However, Henrey did not tell Eaves to skip over his name. Instead, he made some negative comments about the desirability of the Brock and Blevins job, and the business agent interpreted these comments as showing a lack of interest in working on that project. Technically, when the business agent bypassed Henrey's name, it did not constitute a departure from the established referral procedure so much as a mistake made while following it.

The record does not contain even a hint of discriminatory motivation. All the same, I conclude that the failure to refer Henrey when it came his turn on the list violated Section 8(b)(1)(A) and (2). When a union assumes responsibility for hiring employees, through the operation of an exclusive hiring hall, it accepts a heightened duty to make sure that it follows the procedure to which it and the employers have agreed.

CONCLUSIONS OF LAW

1. At all material times, Phillip Getschow has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. At all material times, Plumbers and Pipefitters Local 91, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, has been a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent operates an exclusive hiring hall pursuant to its collective-bargaining agreement with the Associated Plumbing, Heating and Cooling Contractors of Jefferson County and Mechanical Contractors Association of Birmingham, Alabama, also called the "Working Agreement of the Plumbing and Pipefitting Industry, Birmingham, Alabama." In operating this exclusive hiring hall, Respondent must follow procedures agreed upon by the parties and set forth in the following two documents associated with the collective-bargaining agreement: "Regulations for Application for Hiring Procedure" and "Plan II–Simple Rotation System."

4. On or about January 8, 1998, Respondent tailed to refer applicant Arthur Moorehead to employment with the contractor Phillip Getschow, notwithstanding that Moorehead should have been referred to this employment under the procedures described in paragraph 3, above. Respondent thereby restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, in violation of Section 8(b)(1)(A) of the Act, and caused an employer to discriminate against an employee in violation of Section 8(a)(3) of the Act, in violation of Section 8(b)(2) of the Act.

5. On or about January 12, 1998, Respondent failed to refer applicant George G. Henrey to employment with the contractor Brock and Blevins, notwithstanding that Henrey should have been referred to this employment under the procedures described in paragraph 3, above. Respondent thereby restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, in violation of Section 8(b)(1)(A) of the Act, and caused an employer to discriminate against an employee in violation of Section 8(a)(3) of the Act, in violation of Section 8(b)(2) of the Act.

REMEDY

Having found that Respondent violated the Act as alleged in the complaint, I recommend that it be ordered to post the notice to members attached as appendix A, and comply with the Order in this decision. Further, I recommend that Respondent be ordered to make whole Arthur Moorehead and George G. Henrey for all losses they suffered because of these violations.

[Recommended Order omitted from publication.]